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SUBJECT: COSTA RICA - AUSTR VISIT CLEARLY LAYS OUT REMAINING CAFTA
IMPLEMENTATION REQUIREMENTS

REFS: A) SAN JOSE 541
B) SAN JOSE 508

SUMMARY

¶1. (SBU) Visiting Costa Rica June 24-26 at GOCR request, AUSTR Everett Eissenstat told GOCR officials that legislative solutions are required to resolve the state guarantee (insurance) and biodiversity issues. GOCR officials, including President Arias, made equally clear that new legislation at this late date in the implementation process would be, in their view, politically impossible, although the GOCR is willing to explore creative non-legislative solutions. In frank but friendly discussions, both sides agreed to set the insurance issue aside for now, and made progress on biodiversity. Tanuja Garde (USTR Director of Intellectual Property) and George York (USTR General Counsel's Office) accompanied AUSTR.

¶2. (U) The GOCR remains optimistic that all legislation will be completed by August-September, and hopeful that USTR will not continue to insist on a legislative remedy for the insurance issue. If a new bill is absolutely required, the GOCR needs to know ASAP. Since the AUSTR visit, the existing insurance law and the revised IPR enforcement bill were approved in second reading, becoming the ninth and tenth CAFTA bills to be completed by the legislature. At this point, only three bills remain. SEE ACTION REQUEST, Para 16. END SUMMARY.

TIGHT AGENDA

¶3. (U) Repeated airline delays complicated the visit, which was originally scheduled for June 23-25. A reception at the Ambassador's residence on June 24, which had been meant to be the culmination of a long day of political meetings, instead became the first formal event. June 25 was devoted to political meetings in the morning with GOCR officials and key pro-CAFTA legislators, followed by technical meetings and a session with the private sector in the afternoon. Events on June 26 were limited to an IPR technical meeting and a final wrap-up with Minister of Foreign Trade (COMEX) Marco Vinicio Ruiz and his team.

FIRST, OPTIMISM

¶4. (SBU) The primary purposes of the AUSTR visit were 1) to help motivate legislators and members of the executive branch to conclude the necessary CAFTA-DR implementation legislation on time and 2) to advance IPR technical discussions. The GOCR had requested the

visit, believing the time was ripe to push the pro-CAFTA G-38 coalition to complete remaining legislation. NOTE: We had prepared for a similar session with legislators during AUSTR's April visit (Ref B), but the GOCR demurred, arguing that the timing was too sensitive then to meet face-to-face with legislators with May 1 leadership elections looming.

15. (SBU) GOCR Ambassador Duenas, visiting from Washington, sketched an optimistic pre-visit picture for Ambassador Cianchette on June 24. He had just come from a meeting with key pro-CAFTA legislators and senior GOCR officials. AUSTR's delayed arrival, in fact, had given the Costa Rican side time for this important preparatory session. Visibly elated, Duenas described an executive-legislature team at last ready to complete CAFTA. Although the G-38 coalition was tired and "paper-thin," the members recognized that work needed to be done on a few outstanding issues (insurance, IPR and biodiversity) and were prepared to consider "creative" solutions. Duenas hoped both the USG and GOCR sides would have "open minds."

THEN, A POLITICAL REALITY CHECK

16. (SBU) The opening session on June 25, hosted at the Presidential office building, at first seemed to confirm Duenas' optimism. Minister of the Presidency Rodrigo Arias, COMEX Minister Ruiz, Legislature President Francisco Pacheco (PLN), PLN Faction Chief Oscar Nunez, PUSC Faction Chief Lorena Vasquez and leading PLN legislators Mayi Antillon (International Relations Committee Chair) and Maureen Ballesteros (Environmental Committee Chair) all reiterated their willingness and flexibility to resolve the remaining insurance (state guarantee), biodiversity and pharmaceutical issues using existing legislation, regulations, side

letters or executive decrees - anything but new legislation. Recounting the "unique" Costa Rican political environment, all recounted the CAFTA difficulties and "historic" progress to date, but evinced optimism that the remaining implementation legislation would be done by September. Vasquez and Ballesteros, in particular, warned of changes that might affect Costa Rica's existing biodiversity law, which had been a sensitive issue during and since the CAFTA referendum in October.

17. (SBU) All ruled out new legislation as politically impossible, citing the still active CAFTA opposition and the frayed, tired G38 coalition. There was stunned silence, therefore, when AUSTR stressed, as the USG had consistently made clear in discussions with COMEX, that legislative solutions were required for the remaining issues, or USTR may not be able to certify Costa Rica for CAFTA entry into force.

THE VIEW FROM THE TOP

18. (SBU) Underscoring the GOCR's concerns, President Oscar Arias then made a brief (surprise) appearance to appeal for USG flexibility. Arias stressed that the U.S. "had no better friend" than Costa Rica, a "consolidated democracy" which shared U.S. values and which was fighting for democracy in the region. Citing the just concluded Six-Party Agreement with the DPRK, Arias asked "if the USG can be flexible with its enemies," why not even more so with its "friends"? Arias added that he had gambled all his political capital on CAFTA, and the Costa Rican people wouldn't understand if after all this effort Costa Rica were left out because of "very little things that frankly aren't worth the trouble." Arias said he could not go to the legislature for a new bill (i.e., to resolve the insurance issue), and concluded, "It would be a very big blow to Costa Rica to be left out (of CAFTA)".

MORE VIEWS FROM THE COALITION

19. (SBU) A follow-on meeting was intended to focus on the problematic Libertarian Party (whose legislators did not attend), as well as helpful independents. Participants in that session underscored the fragility of the pro-CAFTA coalition and the

political impossibility of completing new legislation in time for an October 1 EIF. AUSTREISSENSTAT responded that it was precisely because the GOCR had come so far "in this marathon" that it should not give up with "one last hill to climb." EISENSTAT also described the more complex political environment in Washington, given the pending FTAs with Colombia and Panama. He explained that USTR therefore had to handle CAFTA very carefully and correctly; the discussion is not just about Costa Rica's EIF, but about "the entire USG trade agenda." As discussion continued, independent EVITA ARGUEDAS (ex-Libertarian) posed a hypothetical question: Would the USG consider a limited, focused EIF extension to accommodate resolution of 1-2 final issues (such as completion of a new insurance bill)?

¶10. (U) Other Costa Rica participants in the June 25 morning meetings included legislator Jose Manuel Echandi (IND), Ambassador Duenas, VM of the Presidency Roberto Thompson, GOCR advisors Carlos Arguedas (a former Supreme Court magistrate) and Allan Thompson, and COMEX staff Fernando Ocampo, Suzanna Vazquez, Jose Carlos Quirce (from the Embassy in Washington) and Gabriella Castro (COMEX). U.S. Embassy participants included Ambassador Cianchette, ADCM Henifin and Kevin Ludeke and Hellen Sanou (Pol/Econ Section staff).

THE VIEW FROM THE PRIVATE SECTOR

¶11. (SBU) In an afternoon session with the private sector, Michael Borg, President of AmCham, and other business leaders pressed AUSTREISSENSTAT on the urgency and importance of finding a non-legislative solution to the insurance issue. Borg and others argued that introducing any new legislation at this time would revitalize the CAFTA opposition, who would portray even a technical correction limiting the state guarantee on insurance as "American interests plundering Costa Rica while the GOCR stands by." With some hyperbole, Borg predicted that an invigorated opposition would then not only be able to block CAFTA, but perhaps to ensure PAC leader Otton Solis' election as president in 2010. AUSTREISSENSTAT reiterated USG political and legal constraints, and suggested that the private sector continue to work with the GOCR, COMEX and the legislature to complete the implementing legislation and regulations.

TECHNICAL DISCUSSIONS MAKE PROGRESS ON BIODIVERSITY

¶12. (SBU) Throughout the meetings with the USTR team, GOCR officials and legislators maintained that domestic political sensitivities on environmental and biodiversity issues made changes to Costa Rica's Biodiversity Law political dynamite. The COMEX team was thus under instruction to press for non-legislative solutions to make the Biodiversity Law CAFTA-compliant. The technical teams made progress, but a combination of legislative fixes (in the catch-all IPR bill under discussion in the legislature) and regulations will be required. (Note: other IP aspects of CAFTA were understood by Tanuja Garde to have been resolved, and were only briefly mentioned during the summary sessions.)

¶13. (SBU) The following is a summary of the technical-level discussion on how to make the Biodiversity Law CAFTA-compliant:

-- Article 7: USTR believes that the definition of a micro organism raises doubt concerning the non-patentability of plants and tissues. USTR thus asked to re-define microorganisms. The GOCR believes such a redefinition is not CAFTA language and shouldn't be required by USTR. The GOCR team (Suzanna Vazquez and Fernando Ocampo) agreed to accept a clarification via regulation but not in the law.

-- Article 78: Very clearly states that IP protection won't be extended to certain things [non-genetically-modified organisms and plants are notably on the list]. The law therefore must be changed to eliminate those exceptions. COMEX agreed.

-- Article 80: Gives effective veto power over IP applications to the Technical Commission formed under the Biodiversity Law. This is unacceptable to USTR. USTR proposed that the Biodiversity Law requirements run on a separate track from IP protection, with weekly or daily fines levied on companies that obtain patent protection

without having completed the Biodiversity Law requirements. COMEX had argued earlier that such a fine would be criticized for "putting a price on biodiversity," but appears to have agreed with the basic concept.

-- Article 81: Gives the GOCR the power to require obligatory IP licenses in the case of a declared national emergency "without the need to pay". USTR insists that this provision cannot stand. COMEX agrees.

CONCLUSIONS: Articles 78 and 81 of the Biodiversity Law will be modified by law. Articles 7 and 80 will probably be modified by regulation (otherwise by law).

REGULATIONS MOVING IN PARALLEL TO LEGISLATION

¶14. (SBU) In a separate meeting with AUSTR (chaired by Minister Ruiz), GOCR officials reported that CAFTA regulations were moving in parallel to the remaining legislation, to speed the implementation process. Their goal was to go final with regulations as soon as the relevant laws were completed. Representatives from ARESEP and CONASSIF (GOCR regulatory bodies) described the internal/public review and gazetting process, and predicted that telecom and insurance regulations should be completed by August. According to COMEX officials, SPS and other regulations would be complete "in the next few weeks." Eissenstat urged the GOCR to share the text of the draft regulations before they went to public review. He also reminded the GOCR officials that a special IPR prosecution unit needed to be established before CAFTA EIF, as agreed to in earlier discussions on IPR penalties.

OFFICIALS OPTIMISTIC

¶15. (SBU) GOCR officials have been optimistic, even buoyant, in the wake of CAFTA progress following AUSTR's visit. The existing insurance law was approved in second reading on July 1, and the revised IPR enforcement bill on July 7. These two become the ninth and tenth CAFTA bills completed by the legislature (of thirteen). Of the three remaining, the telecommunications bill is due back from the Constitutional Court in mid-month, and could be approved by the end of July, assuming the Court finds no problems. The catch-all IPR bill ("No. 12") is due out of committee in mid-month, and should be approved in first vote in August. The GOCR hopes the amendments bill, already out of committee, will be approved in first vote by the end of July. Both of those bills are likely to require Constitutional Court review before becoming law.

COMMENT: AN ESSENTIAL, WELL-TIMED VISIT

¶16. (SBU) Although it took a while to gel, the timing was right for this visit. Both sides came away with a very clear picture of the others' interests and limitations. The need for a legislative fix on insurance should not have been such a shock to the GOCR; the USG side has been explicitly pressing for this since January. Despite the clarity of AUSTR's message, the GOCR side still appears to be hoping that a new insurance law will not/not be required. Minister Ruiz plans to be in Geneva July 19 and is willing to discuss the issue further there with USTR Schwab, if necessary. If a new insurance law is absolutely required, the GOCR needs to know ASAP. Also, the media and the GOCR are assuming that Costa Rica has until September 30 to complete the CAFTA legislation. ACTION REQUEST: To debunk this myth, please advise the realistic deadline to complete the legislation.

¶17. (U) This cable was cleared by AUSTR Eissenstat.